

dBu contour would extend at least 6 kilometers further toward the Montgomery reference point than Glendale's co-channel interference contour. Therefore, Glendale's proposal would not result in objectionable interference. Glendale Ex. 3, P. 8.

f. The Large Available Site Area for a Montgomery Applicant

121. A grant of Glendale's application would not materially reduce the area within which an applicant for the Montgomery channel could locate a site. Any applicant for Channel 63 in Montgomery would have to specify a site at least 280.8 kilometers from the WHSG site. A denial of Glendale's application would not appreciably increase the available area within which a Montgomery applicant could locate a site because such an applicant would still have to protect the WHSG site. If Glendale's application is granted, an applicant would have an area of at least 517 square kilometers within which to locate a site. That calculation assumes that the applicant for the Montgomery channel is proposing 3000 kw ERP with an antenna 300 meters HAAT (modest facilities), which is considerably less than the maximum facilities allowed by the Commission. If an applicant proposes maximum facilities, the available area within which a site could be placed would be increased to 1,800 square kilometers. Glendale Ex. 3, Pp. 8, 15.

g. The WFOX Site

122. Trinity offered testimony from Randy Mullinax, the chief engineer of WFOX(FM), Gainesville, Georgia. Trinity Ex. 34. Mr. Mullinax has been employed by Shamrock Broadcasting, Inc. (Shamrock), the licensee of WFOX(FM), since December 1983. Prior to that time, he was WFOX's chief engineer for the previous licensee. Trinity Ex. 34, P. 1.

123. WFOX operates from a broadcast tower located at 34-07-32 North Latitude, 83-51-31 West Longitude. Trinity Ex. 34, P. 1. The tower is located more than 280.8 kilometers from the Montgomery reference point. Glendale Ex. 3, P. 11. According to Mr. Mullinax, the WFOX tower was specifically designed to accommodate a high powered television antenna, at a level 491 meters (1,611 feet) above ground. He testified that space has been available for a high power television antenna at that level since 1984. Trinity Ex. 34, P. 1.

124. In an earlier declaration submitted in this proceeding Mr. Mullinax stated:

There is no warranty that the space will be available now or at any time in the future. The leasing of this tower space is fluid, and the needs of present tenants have priority over new or prospective tenants. This Statement is not an offer to lease space now or at any time in the future.

Glendale Ex. 4. Trinity Ex. 34 contains essentially the same language, except for the last sentence, and contains the following addition:

WFOX has been willing to negotiate in good faith with prospective tenants or users for lease of that space upon inquiry.

Trinity Ex. 34, Pp. 1-2.

125. In fact, Mr. Mullinax could not say that Shamrock could make space available to Glendale on the WFOX tower because he had not reviewed Glendale's proposal. Tr. 208-209. There were wind loading and space requirements, and Mr. Mullinax did not know whether the tower could accommodate Glendale's proposal within those requirements. Id.

126. Mr. Mullinax could not state the lease cost for Glendale because he was not familiar with Glendale's proposal. Tr. 204, 207-208. Mr. Mullinax is not competent by himself to set price terms for any lease or to make space available. Leonard Stephens of Tall Tower Economics, Inc. is the leasing agent for the WFOX tower. Tr. 197-198. Mr. Stephens is the primary person who negotiates lease terms. Tr. 200. Mr. Mullinax's primary involvement in lease negotiations is with technical matters. Tr. 199. To Mr. Mullinax's knowledge, no Shamrock officer has seen Trinity Ex. 34. Tr. 201.

127. Shamrock is not willing to hold space for any potential user with whom Shamrock is not actively negotiating a lease contract. Tr. 202-203. The leasing of space is fluid. Tr. 203.

128. When the original construction permit for Channel 63 in Monroe was issued to Monroe Television, Inc., the transmitter site specified in the permit was the WFOX tower.

Compare Trinity Ex. 34, P. 1 and Glendale Ex. 5. Mr. Mullinax was involved in lease negotiations with Monroe Television, Inc. Tr. 185. It is Mr. Mullinax's understanding that the negotiations had ceased because Trinity had bought the permit and Trinity "had decided to build their own tower in another location." Tr. 186. That fact was not disclosed in his statement. Trinity Ex. 34.

h. Glendale's Request to Change Reference
Coordinates⁴⁰

129. On September 22, 1993, Glendale, through Mr. Mullaney, filed a request with the Allocations Branch, Policy and Rules Division, Mass Media Bureau asking it to change the Montgomery reference point to eliminate the short-spacing between that point, WHSG, and Glendale's proposed site.⁴¹ Mr. Mullaney demonstrated that the proposed change would not only eliminate the short-spacing between WHSG and the allotment but was necessary to effectively protect the Montgomery allotment. Trinity opposed this request on October 13, 1993, and Glendale

⁴⁰ Glendale asks the Presiding Judge to take official notice of the documents described in this section. The Presiding Judge specifically invited Glendale to request official notice of the documents and to make appropriate arguments in its findings. Tr. 175-176.

⁴¹ A copy of this letter is submitted at Attachment 1 to these proposed findings and conclusions.

replied on October 21, 1993.⁴² Although Glendale has requested expedited action, no action has been taken on this request.

3. Media Interests⁴³

130. George F. Gardner holds 100% voting control of the following mass media facilities:

A. LOW POWER TELEVISION (LPTV) STATION

Low power television station W40AF, Dillsburg, Pennsylvania.

B. CABLE TELEVISION (CATV) SYSTEMS

TV Cable of Carlisle

Subscribers:	16,103
Communities:	Carlisle, Mt. Holly Springs, North Middleton, South Middleton, Monroe, Middlesex, Silver Spring, Dickinson, West Pennsboro, Carroll, and Penn (all in Pennsylvania)
Active Channels:	56
Local Origination:	1 channel

TV Cable of Berkeley County

Subscribers:	4046
Communities:	Berkeley County and Hedgesville (West Virginia)

⁴² Copies of Trinity's opposition and Glendale's reply are submitted as Attachments 2 and 3, respectively, to these proposed findings and conclusions.

⁴³ The citation for all findings in this section is Glendale Ex. 2.

Active Channels: 42

Local Origination: 1 channel

TV Cable of Central PA (Avis Headend)

Subscribers: 6893

Communities: Renovo, South Renovo, Chapman,
Noyes, Avis, Salladasburg, Pine
Creek, Wayne, Porter, Crawford,
Dunnstable, Nippenose, Piatt,
Watson, Mifflin, Cummings,
Limestone, and Jersey Shore (all in
Pennsylvania)

Active Channels: 39

Local Origination: 1 channel

TV Cable of Central PA (Hughesville Headend)

Subscribers: 4307

Communities: Muncy, Hughesville, Muncy Creek,
Wolf, Picture Rocks, Muncy Township,
Penn, and Shrewsbury (all in
Pennsylvania)

Active Channels: 32

Local Origination: 1 channel

TV Cable of Waynesboro (Ft. Loudon Headend)

Subscribers: 1401

Communities: Peters, Metal, St. Thomas, and
Hamilton (all in Pennsylvania)

Active Channels: 33

Local Origination: 1 channel

TV Cable of Waynesboro (Blue Ridge Summit Headend)

Subscribers: 8036

Communities: Waynesboro, Washington, Quincy, Mont
Alto, and Guilford (all in

Pennsylvania), Washington County,
MD, Frederick County, MD

Active Channels: 43

Local Origination: 1 channel

GH Cable Arizona (Payson Headend)

Subscribers: 4577

Communities: Payson, Gila County, Round Valley,
Oxbow Estates, Mesa Del, and Star
Valley (all in Arizona)

Active Channels: 36

Local Origination: 1 channel

GH Cable Arizona (Pine Strawberry Headend)

Subscribers: 1272

Communities: Pine, Strawberry, and Gila County
(all in Arizona)

Active Channels: 23

Local Origination: None

GH Cable Arizona (Christopher Creek Headend)

Subscribers: 122

Communities: Christopher Creek and Gila County
(Arizona)

Active Channels: 12

Local Origination: None

GH Cable Arizona (Bear Flats Headend)

Subscribers: 26

Communities: Bear Flats and Gila County (Arizona)

Active Channels: 5

Local Origination: None

GH Cable Arizona (Kohls Ranch Headend)

Subscribers: 184
Communities: Kohls Ranch, Gila County, Tonto
Village, and Thompson Draw (Arizona)
Active Channels: 12
Local Origination: None

GH Cable Arizona (Williams Headend)

Subscribers: 1040
Communities: Williams and Coconino County
(Arizona)
Active Channels: 23
Local Origination: None

GH Cable Arizona (Concho Headend)

Subscribers: 153
Communities: Concho and Apache County (Arizona)
Active Channels: 13
Local Origination: None

GH Cable Arizona (St. Johns Headend)

Subscribers: 742
Communities: St. Johns and Apache County
(Arizona)
Active Channels: 20
Local Origination: 1 channel

GH Cable Arizona (Eagar Headend)

Subscribers: 1271
Communities: Springerville, Eagar, and Apache
County (Arizona)
Active Channels: 22

Local Origination: 1 channel

GH Cable Arizona (Columbia Headend)

Subscribers: 3159

Communities: Columbia and Marion County
(Mississippi)

Active Channels: 32

Local Origination: 1 channel

The subscriber and channel information is correct as of March 31, 1994.

III. PROPOSED CONCLUSIONS OF LAW

A. Glendale - Short-Spacing Issue

131. Trinity's operating facility is short-spaced by 18.14 km to the reference point for channel *63, Montgomery, Alabama. Glendale's proposed facility is short-spaced to the reference point by 18.4 km, or .26 km (853 feet) more than Trinity. Moreover, there is uncontradicted engineering testimony that "[t]he extra 0.26 kilometers makes no discernable impact on the Montgomery allocation over and above the impact already caused by the WHSG(TV) site." The purpose of this issue is to determine whether there is any basis for disqualifying Glendale for its short-spacing, which would result in allowing Trinity to continue operating its existing short-spaced facility. The only legal, proper, and logical conclusion to reach is to grant Glendale its requested waiver and to resolve the short-spacing issue in its favor.

1. No Need to Show Availability of Fully-Spaced Sites

132. An important legal dispute between Trinity and Glendale is over the question of whether Glendale is required to show that no fully-spaced (i.e., more than 280.8 kilometers from the Montgomery reference point) sites are available in order to obtain its waiver. In situations outside the comparative renewal context, the requirement generally exists that applicants proposing short-spaced sites first make a threshold showing that suitable non-short-spaced sites be unavailable. See, e.g., Townsend Broadcasting Corp., 62 FCC 2d 511, 512, 38 RR 2d 880, 881 (1976). In a comparative renewal proceeding, however, when the incumbent licensee is short-spaced, however, the Commission does not require a challenger to be fully-spaced. Instead, the Commission's policy is to allow the challenger to step into the shoes of the incumbent licensee.

133. In EZ Communications, Inc., 8 FCC Rcd 2448, 2450-2451 (MMB 1993), the Mass Media Bureau rejected the argument by an incumbent licensee that a renewal challenger should be dismissed as short-spaced although the incumbent was actually more short-spaced than the challenger. The Mass Media Bureau rejected the incumbent's arguments and held that the challenger's engineering proposal was fully consistent with Commission policy. It held:

We will not dismiss Allegheny's application as technically deficient. Here, Allegheny is seeking the license currently controlled by EZ. Our engineering study shows that the contours of EZ's existing station extend further in the direction of WQIO than do the contours of Allegheny's proposed station. Consequently, a grant of Allegheny's application would not result in an increase in radiation toward WQIO. Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application. See, Royce International Broadcasting, 2 FCC Rcd 1368 (1987). Moreover, while the Commission did eliminate the Cameron presumption in 1989, that presumption only related to the availability to a challenger of an incumbent licensee's facilities. By eliminating the presumption, however, the Commission did not change the challenger's right to have its application processed under the same standards as the incumbent's. In Amendment of Part 73 of the Commissions Rules to Permit Short-Spaced FM Stations Assignments by Using Directional Antennas, 6 FCC Rcd 5356, 5364 (1991), the Commission specifically stated that it would permit existing short-spaced licensees to relocate to another similarly short-spaced site, provided the current overlap is not increased. We agree with Allegheny that, under these circumstances, to preclude the processing of its application pursuant to Section 73.213 would create an impermissible bias in favor of the incumbent licensee. See Las Vegas Broadcasting Co. [589 F.2d 594, 600 (D.C. Cir. 1978).]

The above discussion clearly demonstrates that there is no requirement that Glendale show the unavailability of fully-spaced sites. The Bureau did not even discuss the absence or presence of fully-spaced sites before ruling on the Allegheny application. Moreover, a corollary requirement of the general rule that fully-spaced sites must be unavailable is that less short-spaced sites must also be unavailable. See K-W TV,

Inc., 7 FCC Rcd 3617, 3618, 70 RR 2d 1655, 1657 (1992), Caloosa Television Corp., 3 FCC Rcd 3656, 3657, 64 RR 2d 1640, 1643 (1988). The challenger in EZ was not required to show that less short-spaced sites were available. Thus the general requirement for such a showing does not exist in a comparative renewal proceeding when the incumbent licensee is short-spaced.

134. Indeed, the Commission could not impose such a requirement on Glendale. As noted in EZ, the Court of Appeals has held that the Commission may not impose disparate requirements on renewal challengers that would create a pro-incumbent bias in comparative hearings. Las Vegas Valley Broadcasting Co. v. FCC, 589 F.2d 594, 600 (D.C. Cir. 1978). Such an illegal bias would be created if Glendale was restricted to fully-spaced sites while Trinity could remain at its short-spaced site. Moreover, there is no logical basis for such disparate treatment. If Glendale's waiver request is denied, there will still be a short-spacing of 18.14 km between WHSG and the Montgomery reference point. Any potential applicant for the Montgomery channel would not care with whom the short-spacing exists - it is the fact of the short-spacing that is significant.⁴⁴

⁴⁴ If Glendale had been able to obtain FAA approval for the Bryant site, which was farther away from the Montgomery reference point than the WHSG tower, Glendale clearly would have been entitled to summary decision as a matter of law. As noted below, Glendale moved where it did in order to obtain FAA approval.

135. The Presiding Judge has already recognized the principle that Glendale "is entitled to be treated the same as the incumbent licensee." Memorandum Opinion and Order, FCC 93M-577 (released September 10, 1993). Indeed, the Presiding Judge noted at hearing that if Glendale had been at the same site as Trinity, he would have granted Glendale's motion for summary decision. Tr. 132-133.

2. Magnitude of the Short-Spacing

136. The magnitude of the short-spacing in question is an important consideration in ruling on a waiver request. Caloosa Television Corp., supra. When the proposal is to increase an existing short-spacing, the Commission focuses not on the total short-spacing, but on the magnitude of the proposed increase. For instance, in The Outlet Co., 11 FCC 2d 528, 531-532, 12 RR 2d 387, 391 (1968), the Commission focused not on the total short-spacing of six miles but the proposed increase of only 1.3 miles. This policy is required by common sense. If a request to increase an existing short-spacing is denied, the existing short-spacing is not eliminated. Similarly, in this case, the choice is not between a fully-spaced station and a short-spaced station. It is between a short-spacing of 18.14 km and a short-spacing of 18.4 km. As the Presiding Judge has recognized, Glendale had the absolute right to be up to 18.14 km short-spaced to the Montgomery

reference point. Glendale need only justify the extra .26 km of short-spacing.

137. The .26 km increase in short-spacing is de minimis. A short-spacing of less than one mile (or 1.6 kilometers) is de minimis. Kenter Broadcasting Co., 62 RR 2d 1573, 1577 n.9 (1987). In this case, while the total short-spacing is less than one mile, Glendale must only justify the increase in short-spacing, which is far less than one mile. Indeed, the increase in question is less than 1/1000th of the total distance between Glendale's proposed station and the Montgomery reference point.⁴⁵

3. Lack of Interference/Equivalent Protection

138. In Caloosa Television Corp., supra, the Commission said it would look at an applicant's technical proposals to reduce or to eliminate objectionable interference. Historically, the Commission has also considered a significant factor supporting a waiver to be that the applicant would provide "equivalent protection": i.e. "even though there is short-spacing under the standards set forth in §73.610 of the Rules, the degree of interference will not exceed that which would exist if the transmitters were at the required minimum

⁴⁵ The de minimis nature of the increase provides an independent basis for concluding that Glendale was not required to search for full spaced sites. As the Commission noted in Kenter, no applicant is required to show the unavailability of fully spaced sites when a de minimis amount of short spacing is in question. Id.

separation specified in the Rules." The Outlet Co., supra. The Commission has considered the provision of equivalent protection to be an important factor supporting a waiver in many cases. See Sarkes Tarzian, Inc., 6 FCC Rcd 2465, 2467, 69 RR 2d 157, 160 (1991), Roy H. Park Broadcasting, Inc., 45 RR 2d 1083, 1085 (Chief, Broadcast Bureau 1979) ("Interference protection equivalent to that of the mileage separations will be provided station WSOC-TV."), Television Broadcasters, Inc., 4 RR 2d 119, 122 (1965). Indeed, in Television Broadcasters, the Commission held that the licensee who would be subject to the short-spacing did not even have standing to challenge the application because equivalent protection would be provided.

139. In this case, Glendale's consulting engineer has shown that Glendale would provide greater interference protection than a fully-spaced station operating with maximum facilities. Trinity did not even attempt to rebut that showing. Glendale's provision of greater protection than required under the Commission's rules is an important public interest factor supporting a grant of its waiver request.

140. In the comparative renewal proceeding, it is very important to note that there is no discernable difference between Trinity's operating facility and Glendale's proposed facility. Indeed, in EZ Communications, Inc., supra, 8 FCC Rcd at 2451, the Mass Media Bureau held:

Where a grant would not increase cognizable interference above and beyond that presently caused by the existing licensee the Commission will not dismiss or deny the challenger's application.

Trinity did not even attempt to rebut Mr. Mullaney's statement that the extra 0.26 kilometers "makes no discernable impact on the Montgomery allocation over and above the impact already caused by the WHSG(TV) site." Glendale will not cause any "cognizable interference" because it will provide greater protection than a fully-spaced station operating with maximum facilities. Accordingly, this factor, by itself, requires a grant of a waiver to Glendale.

4. FAA Considerations

141. Another important factor in evaluating a short-spacing waiver request is "the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area..." Caloosa Television Corp., supra, Roy H. Park Broadcasting, Inc., supra. Here, a grant of a waiver would provide significant aeronautical benefits because it would allow Glendale to operate from a site which has FAA approval.

142. Indeed, the only reason Glendale is more short-spaced than Trinity (albeit only by .26 kilometers) is that the FAA rejected Glendale's original site, which would have reduced the short-spacing. The FAA objected to the original site because of a Visual Flight Rules (VFR) route that John P. Allen, Glendale's aeronautical consultant, had no way of

discovering when he performed his initial evaluation. The FAA gave Mr. Allen an ultimatum: move as close as you can to the northwest or southeast of the Trinity tower, or it would issue a hazard determination.

143. Under these circumstances, Glendale had no choice but to move where it did. Glendale clearly had to do something - it would be disqualified if the FAA issued a hazard determination and Glendale did not change its proposal. Glendale had to act quickly - it is axiomatic that applicants must act with due diligence in filing amendments. Erwin O'Connor Broadcasting, Co., 22 FCC 2d 140, 18 RR 2d 820 (Rev. Bd. 1970). It is equally axiomatic that Glendale could not file an amendment resolving its FAA problems until it had a site which was approved by the FAA. If Glendale had moved to another piece of land away from the current site and the WHSG tower, the FAA would have started its evaluation process all over again, and there would have always been the possibility that the FAA would have rejected that site. Glendale therefore took the readily apparent course of action - it searched for a new site consistent with the FAA's requirements. The only site Mr. Daly could find that met the FAA's requirements was the Hall site. Glendale's need to accommodate air safety and the FAA is an important public interest factor supporting a grant of its waiver request. Certainly, Glendale should not be punished for accommodating the FAA.

144. A brief word is appropriate about Trinity's proffer of evidence concerning the fully-spaced WFOX tower. Presumably, Trinity offered this evidence to show the availability of a fully-spaced site for which FAA approval would not be necessary. Trinity's showing is fatally defective because it does not show the availability of that site to Glendale. Shamrock Broadcasting, the owner of the WFOX tower, is not offering to lease space to Glendale. Indeed, Mr. Mullinax could not say whether the WFOX tower would accommodate Glendale's proposal because he was unfamiliar with Glendale's proposal. Moreover, Mr. Mullinax's testimony makes clear that Shamrock Broadcasting, the tower owner, is not willing to hold space for Glendale but would only consider talking to Glendale if Glendale was willing to enter into a definitive lease agreement at the application stage. "The Commission has consistently held that an applicant need not enter into a final or binding agreement in order to demonstrate reasonable assurance of site availability." Alden Communications Corp., 3 FCC Rcd 3937, 3938, 64 RR 2d 1612, 1614 (1988). Finally, Mr. Mullinax is not competent to say whether the site would be available because it is the leasing agent who would primarily set the terms for any lease. Mr. Mullinax could not say what any lease terms would be. For those reasons, Trinity's showing is of no relevance to this proceeding.

5. Availability of Site Area for Montgomery Applicant

145. When the Commission has been faced with a short-spacing to a vacant allotment, it has looked favorably upon waiver requests when there would still be a large area within which a transmitter site could be located for the allotment consistent with the Commission's spacing rule. For example, in Delta Rio Broadcasting Co., 50 FCC 2d 596, 32 RR 2d 205 (1974), the Commission granted a waiver to a proposal that was short-spaced by 9.5 miles to a reference point, in large part because there was a substantial area suitable for future operation on the vacant allotment. The Commission also relied upon a similar showing in Central Virginia Educational Television Corp., 49 RR 2d 435, 436 (1981) (see clause (e)). Here, Mr. Mullaney has shown the existence of an area of up to 1,800 square kilometers (about 691 square miles) in which an applicant for the Montgomery channel could find a site if Glendale's application is granted. Importantly, that area would not increase if Glendale's waiver request was denied because any applicant would still have to be more than 280.8 kilometers from the WHSG site. The large available site area is yet another factor supporting Glendale's waiver request.⁴⁶

⁴⁶ When the short spacing is to an existing station, the Commission would take into account that station's concerns in evaluating the waiver request. Caloosa Television Corp., supra. Here, there is no such station.

6. Loss of Service

146. If the grant of a waiver would result in a loss of service, that loss of service would militate against the grant of a waiver. Caloosa Television Corp., supra. Absolutely no evidence was offered that any such loss would result, however.

7. Summary of Relevant Factors

147. All of the record evidence supports a grant of Glendale's waiver request. Glendale was not required to show the unavailability of fully-spaced sites because Trinity's station is short-spaced. Glendale's proposed station is indistinguishable from Trinity's station from an engineering viewpoint. The amount of short-spacing that Glendale must justify is extremely minimal - .26 km. There are an impressive array of public interest factors supporting Glendale's waiver request - the provision of greater interference protection than a fully-spaced station would necessarily provide, the benefits to aeronautical safety resulting from Glendale's cooperation with the FAA, and the availability of a large site area for any future applicant for the Montgomery channel. Glendale's engineering showing is wholly un rebutted. If Glendale's waiver request is denied, Trinity will continue to operate with virtually the same amount of short-spacing. The issue must be resolved in Glendale's favor, and Glendale is fully qualified to become a Commission licensee.

8. Alternative Request

148. If the Presiding Judge determines for some reason that Glendale is not entitled to a waiver, the proper remedy is not to deny the application but to place a condition on the grant of Glendale's application. The condition would require that before Glendale could operate from its current site, the Allocations Branch of the Mass Media Bureau must change the Montgomery reference point so as to eliminate the short-spacing between that point and Glendale's site.

149. The Mass Media Bureau and the Commission frequently use conditions to resolve potential interference problems. For example, when a station is to be located near a Commission monitoring station, the Commission frequently imposes a condition limiting the radiation at the monitoring station. See, e.g., Brenda R. Tanger, 2 FCC Rcd 4658, 4659 (MMB 1987), authorization issued to KLYN(FM) dated August 12, 1993, Pp. 4-5 (submitted as Attachment 4 to these findings). Similarly, the Commission often deals with potential interference to FAA radio equipment by imposing an appropriate condition. See, e.g., Order, FCC 93M-492 (released July 27, 1993).

150. In this case, a condition (as opposed to a denial) would be appropriate because the short-spacing would be eliminated if the Allocations Branch moved the Montgomery reference point so as to eliminate the short-spacing. It would be a denial of due process to deny Glendale's application and then have the Allocations Branch eliminate the

short-spacing. Glendale filed its request to move the reference coordinates over one year ago. For reasons unknown, the request has not been acted upon. Elementary due process requires that if a waiver is deemed inappropriate, Glendale's request to change the reference coordinates must be acted upon before its application is denied. Otherwise, its application could be denied for a nonexistent problem.⁴⁷

B. Renewal Expectancy

1. The Standards

151. The fundamental benchmark for determining a licensee's entitlement to a renewal expectancy is its service to its community of license. The requirement to serve the community of license is established in Section 307(b) of the Communications Act of 1934, as amended. One of the purposes of Section 307(b) was to avoid having all broadcast stations concentrated in big cities. See Pasadena Broadcasting Co. v. FCC, 555 F.2d 1046, 1049-1050, 40 RR 2d 1003, 1009-1010 (D.C. Cir. 1977). Indeed, local broadcast service has been deemed to be so important that in deregulating commercial television, the Commission held:

In light of these considerations, we believe that, in this context the only programming obligation of a licensee should be to provide programming

⁴⁷ If the Presiding Judge agrees with Glendale that a waiver is fully justified, this alternative request is moot.

responsive to issues of concern to its community of license. Accordingly, a commercial television broadcaster will remain subject to an obligation to provide programming that is responsive to the issues confronting its community.

In the Matter of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, 98 FCC 2d 1076, 1091-1092, 56 RR 2d 1005, 1018 (1984) (hereinafter Deregulation of Commercial Television) (emphasis added).

152. The Commission evaluates five factors in determining whether a licensee is entitled to a renewal expectancy:

(1) the licensee's efforts to ascertain the needs, problems and interests of its community; (2) the licensee's programmatic response to those ascertained needs; (3) the licensee's reputation in the community for serving the needs, problems and interests; (4) the licensee's record of compliance with the Communications Act and FCC rules and policies; and (5) the presence or absence of any special effort at community outreach or towards providing a forum for local self-expression.

Fox Television Stations, Inc., 9 FCC Rcd 62, 63, 74 RR 2d 922, 924 (1993) (emphasis added). With respect to programming, an important factor is how much of the programming is locally produced. Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, 4 FCC Rcd 6363, 6368 n.11 (1989).

153. In this case, Trinity is licensed to Monroe, Georgia, a community about thirty-five miles east of Atlanta and located in Fulton County. The record conclusively shows that Trinity totally ignored Monroe and the county it is located in (Walton County). It conducted no ascertainment efforts that were directed towards learning the needs and interests of Monroe or Walton County. It did not cover a single event that took place in Monroe or Walton County, and not one person from those areas appeared on the station. Indeed, Trinity did not produce any local programming whatsoever, and it only had one service area program during the majority of the renewal period. Trinity did not have any local news, editorials, or political programming because it did not have any such programming. The record does not contain any public witness testimony supporting Trinity's renewal or any evidence of community involvement by Trinity. All of the Fox criteria require the denial of a renewal expectancy. Trinity's record of service is truly minimal and totally unworthy of a renewal expectancy. When the record of serious misconduct and dishonesty by Trinity's principals developed in the Miami, Florida proceeding is considered, there is no rational basis for awarding any renewal expectancy.

2. Ascertainment

154. Trinity did not conduct any ascertainment during the first quarter of 1991. While it did conduct ascertainment efforts during the remainder of the renewal period, it made no effort to ascertain the needs and interests of its community of license (Monroe) or the county of license that the community was in (Walton County). Trinity used two main ascertainment methods during the renewal period - the reading of newspapers and community leader interviews.⁴⁸ In using newspapers, Trinity totally ignored the newspaper published in Monroe (The Walton Tribune) and relied upon the Atlanta Journal Constitution. The record shows that Atlanta and Monroe are completely separate and independent communities located in different counties, and Trinity has offered no evidence that the Atlanta Journal Constitution provided any coverage of Monroe or Walton County. Trinity's most fundamental obligation was to provide programming responsive "to issues of concern to its community of license." Deregulation of Commercial Television, *supra*. Trinity never bothered to ascertain what the important needs and interests of Monroe or Walton County were. It therefore failed to meet its most fundamental obligation.

⁴⁸ In the first quarter of 1992, Trinity also took into account telephone responses from viewers. Since Mr. Jackson could not even recall how such calls were used, however, no finding can be made as to where those calls came from.